SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~1282~~ 70-66

RICHARD L. ROUDEBUSH,

Appellant,

vs.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

REPLY BRIEF FOR APPELLANT.

DONALD A. SCHABEL,
111 Monument Circle,
Indianapolis, Indiana 46204,
Attorney for Appellant.

L. KEITH BULEN,
CHARLES G. CASTOR,
One Indiana Square,
Indianapolis, Indiana 46204,

JOHN G. TINDER,
620 Union Federal Building,
Indianapolis, Indiana 46204,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1232

RICHARD L. ROUDEBUSH,

Appellant,

vs.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

REPLY BRIEF FOR APPELLANT.

ARGUMENT.

I. The Appeal Is Not Moot.

In part I of his Argument (Appellee's Brief, pp. 4-8), appellee Hartke contends that this appeal should be dismissed for mootness. The event occurring subsequent to the filing of this appeal, which is the basis for the claim of mootness, is the fact that "on January 21, 1971, appellee Hartke presented himself to the Senate, claiming membership therein, and was duly sworn and seated." Relying on

Barry v. *United States ex rel. Cunningham*, 279 U. S. 597 (1929),[1] he argues:

> "The jurisdiction of the Senate to determine and adjudicate the right of appellee Hartke to his seat in that body has been invoked. Whatever may have been Roudebush's rights at an earlier moment, no pronouncement by this court can now divest that tribunal of its exclusive jurisdiction; nor can any such pronouncement presently invest the state recount proceedings with any meaning or effect.
>
> • • • • • •
>
> "This case, in its present posture, is not capable of resolution through the force of any determination by this court. Moreover any such determination would intrude into an area constitutionally committed to another branch of government." (Pages 5-7)

Continuing in footnote 2, appellee argues:

> "That the oath was administered to Senator Hartke, by unanimous consent of the Senate, 'without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order,' * * * does not save the case from mootness. Every senator is seated 'without prejudice' in the sense that *the Senate* may at any time inquire into the merits of his title to the office. * * * But that right

1. The *Barry* case grew out of the election of William S. Vare as United States Senator from Pennsylvania in November, 1926. Prior to the time that Vare claimed his seat, the Senate adopted a resolution appointing a special committee to investigate campaign expenditures and promises, and, in addition, Vare's election was contested by William B. Wilson upon the ground of fraud and unlawful practices in connection with the nomination and election. The Senate refused to permit Vare to take the oath of office pending the outcome of the investigation by the special committee, and the Committee on Privileges and Elections was directed to hear and determine the contest between Vare and Wilson. It was in this context that the court used the language quoted on page 5 of appellee Hartke's brief. By contrast, nothing has as yet been presented to the Senate concerning appellee's Hartke's right to retain his seat as against the appellant.

of inquiry is exclusively in the Senate, and nowhere else." (Page 7)

Since it is appellee Hartke's position that the separation of powers provided by the Constitution deprives this Court of the power to proceed further in this case, it is quite evident that he is confusing "mootness", which goes to the jurisdiction of the Court over the subject matter, with "nonjusticiability", which refers to the inappropriateness of the subject matter for judicial consideration. These are two very different concepts. *Baker* v. *Carr,* 369 U. S. 186, 198 (1962).

With respect to mootness, this Court in *Powell* v. *McCormack,* 395 U. S. 486 (1969), said:

> "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. * * *" (Page 496)

This case has not been mooted by appellee Hartke's seating in the Senate on January 21, 1971, because a live controversy continues to exist between the appellant and appellee Hartke.[2] The term of the Senate seat in dispute does not expire until January 3, 1977.

With respect to justiciability, this Court in *Powell* said:

> "* * * Two determinations must be made in this regard. First, we must decide whether the claim presented and the relief sought are of the type which admit of judicial resolution. Second, we must determine whether the structure of the Federal Government renders the issue presented a 'political question'—that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution." (Pages 516-17)

Appellee Hartke does not maintain that this case is not justiciable in the first or general sense. Indeed, it was he

2. See Appellant's Brief at pages 11-15.

who invoked the jurisdiction of the district court for injuctive relief against the Indiana recount statute. This appeal is from the order of the three-judge district court granting the interlocutory injunction sought by appellee Hartke, and appellee Hartke has not challenged appellant's position that this Court has jurisdiction of this direct appeal under 28 U. S. C. § 1253.[3] Accordingly, it must be concluded that, in terms of the general criteria of justiciability, this case is justiciable.

It is in the second sense mentioned in the quotation from *Powell*—*i.e.* that the issue presented is a "political question"—that appellee Hartke claims that the case is not justiciable. His position is "that the right of inquiry is exclusively in the Senate, and nowhere else." Although he concedes that the case was justiciable prior to January 21, 1971, he maintains that it became nonjusticiable when appellee Hartke claimed his seat in the Senate, notwithstanding the fact that the oath was administered without prejudice to the outcome of this appeal and of any recount that might be ordered.

In order for appellee Hartke's claim of nonjusticiability to be sustained, the Court must find "a textually demonstrable constitutional commitment" of the issue involved in this case to the Senate. *Powell* v. *McCormack*, 395 U. S. 486, 518-519 (1969); *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). In other words, the Court must determine the relationship between the power that Article 1, § 4, of the Constitution confers on the States to prescribe the manner of holding elections for Senators and the power that Article 1, § 5, confers on the Senate to judge the elections, returns and qualifications of its members. Far from being a cause

3. At pages 8-11 of the Appellant's Brief, appellant addresses himself to the question of this Court's jurisdiction of this appeal under 28 U. S. C. § 1253. Appellee Hartke's brief contains no discussion addressed to this point.

for dismissal, appellee Hartke's claim of nonjusticiability requires a determination by the Court of this appeal on the merits.

II. The Anti-Injunction Statute Is Applicable to Proceedings Under the Indiana Recount Statute.

In part II of his Argument (Appellee's Brief, pp. 8-16), appellee Hartke contends that a recount proceeding under Article 27 of the Indiana Election Code is not a "proceeding in a State court" to which the anti-injunction statute, 28 U. S. C. § 2283, applies.[4] After summarizing the provisions of the recount statute, he concludes:

> "As the foregoing summary indicates, the role of the court in the recount proceedings is simply to appoint the recount commission. The court finds no facts and enters no judgment, nor does any direct judicial review lie from the recount commission's determination. Although each affected candidate is entitled to be present himself and to have a 'watcher' present, the recount proceedings are not adversary in character, and the candidates have no right to participate in them. The commission—and not the court or the candidates—conducts the recount. Indiana courts (and both appellants) recognize the ministerial—rather than judicial—character of recount proceedings. See *State ex rel. McCormick* v. *Superior Court of Knox County*, 229 Ind. 118, 95 N. E. 2d 829 (1951); *State ex rel. Watson* v. *Pigg*, 221 Ind. 23, 46 N. E. 2d 232 (1943); Brief for Appellant Roudebush, pp. 32-33; Brief for Appellant Sendak, p. 22.
>
> "Where the function of the court is not judicial, as thus determined, the anti-injunction statute has no application at all. * * * " (Pages 12-13)

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4. Appellee Hartke's brief makes no attempt to defend the position of the court below that 28 U. S. C. § 2283 is, in essence, a statutory adoption of the doctrine of comity and hence discretionary in its application.

Appellee Hartke's conclusion that the function of the court in a recount proceeding is not judicial is incorrect. In *State ex rel. Watson* v. *Pigg*, 221 Ind. 23, 46 N. E. 2d 232 (1943), which appellee Hartke himself relies upon, the court said:

> "• • • With the exceptions hereinafter noted all the duties prescribed therein [the recount statute] seem to be ministerial. *The judge apparently is required to determine that the petition complies with the statute for in § 9 it is provided that he 'shall grant such petition . . . and order the recount . . .' It would seem that he ought to satisfy himself judicially that the proceedings are regular before he makes such an order which in itself is probably a judicial act.* When the order is made, including the appointment of the commissioners, they act ministerially pursuant to such order. It is not required that the judge shall preside over or participate in the examination or count of ballots. But by § 13 he is required by order to impound and provide for the protection of ballots and machines and 'make the same available to said commission.' So, generally, the recount is and necessarily must be under his supervision." (Emphasis added) (221 Ind. at 34)

That the court acts judicially in an election recount proceeding is demonstrated by proceedings set forth in the Appendix on this appeal that were had in the Superior Court of Marion County, Room 3. After the appellant filed his petition for recount of the votes in specified Marion County precincts (A. 8-11), appellee Hartke filed a motion to dismiss the petition, pursuant to Trial Rule 12 of the Indiana Rules of Procedure, for the reason that the court lacked jurisdiction over the subject matter of the action. (A. 12) In his supporting memorandum he argued that the recount statute was unconstitutional as applied to legislative offices. (A. 13-17) The Superior Court of Marion County, Room 3, filed a written opinion upholding the constitutionality of the recount statute and overruling the

motion to dismiss. (A. 18-23) Thereupon, the court entered an order granting appellant's petition and ordering the recount. (A. 24-26) At this point appellee Hartke filed his complaint for injunctive relief in the court below (A. 4-7), and Judge Dillin issued the temporary restraining order without notice. (A. 31-32) Can it be doubted that the Superior Court of Marion County, Room 3, was acting judicially in ruling on appellee Hartke's motion to dismiss and upholding the constitutionality of the recount statute?

In *Hill* v. *Martin*, 296 U. S. 393 (1935), it was said that, in determining whether a judicial proceeding is pending for purposes of the anti-injunction statute, this Court looks to the law of the State. Looking, then, to the law of Indiana, it is clear that the court acts judicially in approving a petition for recount and in ordering the recount. *State ex rel. Watson* v. *Pigg, supra.* That the actual recount of the votes is conducted by ministerial officers appointed by the court does not deprive the proceeding of its judicial character. In *Hill* v. *Martin, supra,* it was also said:

> "*Fourth.* The prohibition of § 265 is against a stay of 'proceedings in any court of a state.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of res judicata. *It applies alike to action by the court and by its ministerial officers;* applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other. And it governs a privy to the state court proceeding—like Elinor Dorrance Hill—as well as the parties of record. *Thus, the prohibition applies whatever the nature of the proceeding, unless the case presents facts*

which bring it within one of the recognized exceptions to Section 265. It is not suggested that there is a basis here for any such exception." (Emphasis added) (296 U. S. at 403)

Further light is shed on the judicial character of the recount proceeding by the language of this Court in *Public Service Co.* v. *Corboy,* 250 U. S. 153 (1919). The Court, in speaking of the anti-injunction statute, said:

> "Be this as it may, it is certain that the prohibitions which the statute imposes secure only the right of the state courts to exert their judicial power; that is, a power called into play alone between parties to a controversy, and the operation of which power when exerted was, from the very fact that it was judicial, confined to the parties, their duties, interests, and property; in other words, to a power falling within the general limitation of things judicial as demarked by the great distinction between legislative, executive, and judicial power upon which the Constitution was framed. This is the necessary result of the ruling in the Prentis Case, by which it is made certain that although a state may have power to confer upon its courts such authority as may be deemed appropriate, it cannot by the exertion of such right, draw into the judicial sphere powers which are intrinsically legislative and executive or both, and thus bring the exercise of such powers within the scope of the prohibition of the statute, with the result of depriving the courts of the United States to that extent of their omnipresent authority to enforce the Constitution.
>
> "It follows necessarily, therefore, that although the Constitution did not limit the power of the states to create courts and to confer upon them such authority as might be deemed best for state purposes, that right could not, by its execution, restrain or limit the power of the courts of the United States by bringing within the state judicial authority subjects which, in their constitutional sense, were nonjudicial in character, and therefore not within the implied or express limitation by

> which courts of the United States were restrained from staying judicial proceedings in state courts. To hold to the contrary would be in large measure to recognize that the exertion of the authority of the courts of the United States was dependent, not upon the nature and character of the subject matter with which they are called upon to deal, but merely upon a state classification.'' (Pages 161-62)

Corboy involved a suit against a drainage commissioner, whom a state court, after having established a drainge district and authorized the construction of a ditch, had appointed to do the work, to enjoin the execution of the work on the ground that the effect of the ditch would be to draw off from an interstate stream such a quantity of water as seriously to diminish the flow in that stream. This Court held that the construction of a drainage ditch was not a subject of the judicial power and that the prohibition of the anti-injunction statute did not apply. Likewise, in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210 (1908), relied on by appellee Hartke, it was held that the anti-injunction statute did not prevent a suit to enjoin the Virginia State Corporation Commission, which was a court for some purposes, from enforcing certain railroad rates that it had established, because the power to fix rates is legislative and not judicial.

By contrast, recounting the votes cast at an election is a subject that can properly be brought within the state judicial authority. In the absence of any state statute granting the right to a recount, such relief can be obtained by the common law remedy of quo warranto or its statutory successors. 44 Am. Jur., *Quo Warranto*, § 27. There can be no question but that quo warranto is a judicial proceeding.

In *State ex rel. Watson* v. *Pigg*, 221 Ind. 23, 46 N. E. 2d 232 (1943), it was said, in respect of the Indiana recount statute, ''that recount is in the nature of discovery, may or

may not be used as an aid to the contest, and does not finally decide the right to hold the office." (221 Ind. 31) But treating recount purely as a means of discovery, it still can properly be brought within the state judicial authority. "The power to enforce discovery is one of the original and inherent powers of a court of equity." 23 Am. Jur. 2d, *Deposition and Discovery*, § 141.

Proceedings under Article 27 of the Indiana Election Code in a circuit or superior court for recount of votes cast are clearly "proceedings in a State court" within the contemplation of 28 U. S. C. § 2283.

III. The Indiana Recount Statute Does Not Conflict With the Senate's Prerogative to Judge the Elections, Returns and Qualifications of Its Members.

In part III of his Argument (Appellee's Brief, pp. 17-21), appellee Hartke discusses the three decisions of the Indiana Supreme Court that held the Indiana recount statute unconstitutional with respect to elections of members of the Indiana General Assembly.[5] As appellant has already pointed out (Appellant's Brief, pp. 30-31), these cases cannot control the constitutionality of the recount statute as it applies to the election of a United States Senator. It is worthy of note that neither the Superior Court of Marion County, Room 3, nor the Lake Circuit Court, in overruling appellee Hartke's motions to dismiss the recount proceedings, felt bound by such decisions.

Appellee Hartke argues (pp. 17-18) that, because of these three decisions, there was no necessity for the district court to postpone the exercise of its jurisdiction in

5. The cases in question are *State ex rel. Acker* v. *Reeves*, 229 Ind. 126, 95 N. E. 2d 838 (1951); *State ex rel. Beaman* v. *Circuit Court of Pike County*, 229 Ind. 190, 96 N. E. 2d 671 (1951); and *State ex rel. Batchelet* v. *DeKalb Circuit Court*, 248 Ind. 481, 229 N. E. 2d 798 (1967).

deference to state court resolution of underlying issues of state law. But appellant has never suggested that the district court should have invoked the doctrine of abstention. No question of state law is presented that might have rendered unnecessary the decision of the federal constitutional question.[6] The recount statute expressly applies to elections for the office of United States Senator. See Burns' Indiana Statutes § 29-5402. (Appellant's Brief, p. A2) The authority for applying the recount procedure to the office of United States Senator is not found in the Constitution of Indiana but in Article 1, § 4, of the Constitution of the United States. Thus, nothing said in any decision by the Supreme Court of Indiana would be binding with respect to the constitutional issue presented in this case.

Finally, in part IV of his Argument (Appellee's Brief, pp. 21-27), appellee Hartke discusses the procedure for tallying the vote under the Indiana Election Code and contends "that a recount would not only encroach upon the constitutional duty of the Senate under Article 1, § 5, but that to permit recounts to go forward would impair the ability of the Senate to perform its constitutional obligation." (Page 25) It suffices to say in answer to this argument that the Senate itself disagrees with it. See S. Rept. No. 1284, 80th Cong., 2d Sess. (1948), which is discussed on page 37 of appellant's brief.

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6. On the other hand, a decision on the federal constitutional question would be unnecessary if 28 U. S. C. § 2283 is applicable, or if the complaint is insufficient to invoke the equity jurisdiction of the court.

CONCLUSION.

The order of the district court granting the interlocutory injunction appealed from should be reversed and the cause remanded to the district court with directions to dismiss the action.

Respectfully submitted,

DONALD A. SCHABEL,
111 Monument Circle,
Indianapolis, Indiana 46204,
Attorney for Appellant.

L. KEITH BULEN,
CHARLES G. CASTOR,
One Indiana Square,
Indianapolis, Indiana 46204,

JOHN G. TINDER,
620 Union Federal Building,
Indianapolis, Indiana 46204,
Of Counsel.

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Appellees.

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INDIANAPOLIS DIVISION

APPELLANT'S REPLY BRIEF

THEODORE L. SENDAK
Attorney General of Indiana

WILLIAM F. THOMPSON
Assistant Attorney General

MARK PEDEN
Deputy Attorney General

Attorneys for Appellant

Offices of the Attorney General
219 State House
Indianapolis, Indiana
(317) 633-5512

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

APPELLANT'S REPLY BRIEF

ARGUMENT

I.

THE CASE IS NOT MOOT

Appellee Hartke has reiterated his claim that this appeal is moot since the United States Senate has already seated him. However, the seating was "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order." 117

Cong. Rec. S 4, 21 Jan. 1971. Appellees' mootness argument glosses over this explicit expression of Senatorial deference by arguing that every Senator is seated "without prejudice" in the sense that *the Senate* may at any time inquire into the merits of his title to the office." (Br., p. 7, n. 2). Appellants do not question that the Senate may always inquire into the title to the office of its members. But where the state recount procedure does not conflict with the senatorial prerogative and is in aid of it, and where the Senate itself has recognized the viability of this appeal as being unprejudiced by its seating of appellee Hartke, it would appear that a claim of mootness by reason of the seating of appellee Hartke is misdirected.

It is in part misdirected because appellee Hartke has incorrectly sought to characterize this appeal as an attempt to compel the seating of appellant Roudebush. All the appeal seeks to accomplish is the holding of a recount procedure—a discovery procedure—in Indiana for the office of Senator. Thus appellee Hartke is incorrect in stating that:

> "This case in its present posture, is not capable of resolution through the force of any determination by this court. Moreover any such determination would intrude into an area constitutionally committed to another branch of government." (Brief pp. 6-7).

This case *is* capable of "resolution" by a determination of this Court. "Resolution" would simply require a recount of this vote. Because the Senate is the ultimate arbiter of whom it seats, the recount itself cannot compel the seating of either candidate. But it is very clear that despite the Senate's ultimate prerogative to judge, appellant Roudebush is entitled to have a recount conducted. That is what this appeal seeks. That is the "resolution" which this Court can accomplish.

Implicit in the appellees' argument of mootness is the notion that the recount conflicts with the rights of the Senate to judge the elecctions of its own members. Appellee Hartke implies that the state recount would conclusively settle the question of the election and that it is an attempt to bar the Senate's consideration of the matter:

> ". . . no pronouncement by this court can now divest that tribunal [Senate] of its exclusive jurisdiction; nor can any such pronouncement presently invest the state recount proceedings with any meaning or effect." (Brief, pp. 5-6).

This appeal can result in a recount. The "meaning or effect" of the recount will be as a discovery tool, as Appellants have claimed all along. The recount itself will not *per se,* seat appellant Roudebush in the Senate, but will disclose which candidate actually received the most votes cast. Appellant Roudebush's right to a recount, the function of which is informative, is clear. Appellee Hartke's right to have the Senate judge the elections of its members is clear. Neither right is in conflict with the other.

Appellee Hartke also contends that the case is moot because there is no controversy between appellee Hartke and appellant Sendak, as Indiana Attorney General, and that the Federal District Court should not have allowed the Attorney General to intervene. (Brief, p. 7). Since this is the first objection by appellee Hartke to the Attorney General's intervention, it comes too late. The interest of the Attorney General stems from his statutory duty to defend the constitutionality of a state statute when attacked. IC 1971, 34-4-10-11, as found in Burns' (1968 Repl.), Section 3-1111. In any event, the matter of permissive intervention under F.R.C.P. 24(b) is one largely for the discretion of the trial court. Barron and Holtzoff, vol. 2, § 602. This appeal is not moot.